Hong Leong Bank Bhd v Khairulnizam bin Jamaludin

FEDERAL COURT (PUTRAJAYA) — CIVIL APPEAL NO 03(i)-1–01 OF 2015(W)
AHMAD MAAROP, HASAN LAH, ABU SAMAH NORDIN, RAMLY ALI AND ZAHARAH IBRAHIM FCJJ
19 MAY 2016

Bankruptcy — Notice — Setting aside — Guarantee of repayment of outstanding amounts outstanding under hire purchase agreement — Default of repayment — Appellant took steps to repossess motor car from hirer — Requested for issue of bankruptcy notice — Whether appellant exhausted all avenues to recover debt owed by hirer — Bankruptcy Act 1967 s 5(3)

The respondent had guaranteed the repayment of amounts outstanding under a hire purchase agreement ('HP agreement') between the appellant and one Mohd Shahreen bin Abd Khabir ('the hirer') in respect of a motor car for personal use. Upon the hirer's default in repayment of the outstanding sums under the HP agreement, the appellant took steps to repossess the motor car from the hirer and commenced legal proceedings against the hirer and the respondent. The appellant filed a request for issue of bankruptcy notice and a bankruptcy notice against the respondent. The validity of the bankruptcy notice against the respondent was extended and the bankruptcy notice was ordered to be served on the respondent by way of substituted service. The respondent applied to set aside the bankruptcy notice. The senior assistant registrar allowed the respondent's application to set aside the bankruptcy notice on the ground, inter alia, that the appellant failed to show any proof to the satisfaction of the court that the appellant had exhausted all avenues to recover the debt owed by the hirer pursuant to s 5(3) of the Bankruptcy Act 1967 ('the Act'). The appellant's appeal to the judicial commissioner ('the JC') against that decision was dismissed. The JC however disagreed with the reason given by the senior assistant registrar and held that the appellant had shown proof to the satisfaction of the court that the appellant had exhausted all avenues to recover the debt owed by the hirer. However, the JC held that the appellant had not complied with s 5(3) of the Act before commencing the bankruptcy proceedings against the respondent who was a social guarantor as the appellant did not apply for leave to court for that purpose. The appellant's appeal against the decision of the JC was dismissed by the Court of Appeal. Hence, the present appeal. The issue that arose was whether the phrase 'unless he proves to the satisfaction of the court that he has exhausted all avenues to recover debts owed to him by the debtor' in s 5(3) of the Act requires a judgment creditor to obtain leave of court prior to commencing a bankruptcy action against a social guarantor?

Held, allowing the appeal:

(1) On a proper reading of ss 5 and 6 of the Act, a creditor has to satisfy the court at the hearing of the creditor's petition that the creditor had exhausted all avenues to recover debts owed to him by the debtor. This could be done by way of an affidavit pursuant to s 6(1) of the Act. Furthermore, the court was required to make a judicial decision on the creditor's petition. On the other hand, when the court issued a bankruptcy notice, the procedure was more administrative in nature (see para 32).

(2) By issuing a bankruptcy notice against a guarantor, it does not make him a bankrupt. When a receiving order is made by the court against a debtor the official assignee becomes the receiver of the property of the debtor. The receiving order does not have the effect of making the debtor bankrupt. The aim of the receiving order is to protect the debtor's property. The debtor is a bankrupt only if adjudged so by the adjudication order pursuant to s 24 of the Act. An adjudication order may be made simultaneously with the making of the receiving order (see para 33).

(3) A reading of s 5(3) of the Act would clearly advance the meaning that it would be sufficient compliance with s 5(3) of the Act if a creditor shows by way affidavit at the hearing of the creditor's petition that he has satisfied the requirement of s 5(3) of the Act. The words 'bankruptcy action' in s 5(3) of the Act has to be read as 'bankruptcy petition'. Under s 2 of the Act the term, 'bankruptcy petition' includes a petition for receiving order (see para 34).

(4) The High Court was satisfied from the affidavit evidence that the appellant had proved that it had exhausted all avenues to recover debts owed to him by the hirer. As such, the appellant had satisfied the requirement of s 5(3) of the Act to commence the bankruptcy action against the respondent. The question of law posed in this appeal was answered in the negative. The orders of the courts below are set aside (see paras 35–36).

[Bahasa Malaysia summary

Responden telah menjamin bayaran balik jumlah yang belum dijelaskan di bawah perjanjian sewa beli ('perjanjian SB tersebut') di antara perayu dan seorang yang bernama Mohd Shahreen bin Abd Khabir ('peminjam') berkaitan motokar bagi penggunaan persendirian. Atas keingkaran bayaran balik peminjam terhadap jumlah yang belum dijelaskan di bawah perjanjian SB tersebut, perayu mengambil langkah untuk menarik balik motokar daripada peminjam dan memulakan prosiding undang-undang terhadap peminjam dan responden. Perayu memfailkan permohonan untuk pengeluaran notis kebankrapan dan notis kebankrapan terhadap responden. Kesahan notis

kebankrapan terhadap responden dilanjutkan dan notis kebankrapan diperintahkan untuk diserahkan ke atas responden melalui penyerahan ganti. Responden memohon untuk mengetepikan notis kebankrapan tersebut. Timbalan kanan pendaftar membenarkan permohonan responden untuk mengetepikan notis kebankrapan tersebut atas alasan, antara lain, bahawa perayu gagal untuk menunjukkan apa-apa bukti untuk memuaskan mahkamah bahawa perayu telah menggunakan kesemua cara untuk mendapatkan kembali hutang yang kena dibayar oleh peminjam berikutan s 5(3) Akta Kebankrapan 1967 ('Akta'). Rayuan perayu kepada pesuruhjaya kehakiman ('PK') terhadap keputusan tersebut ditolak. PK walau bagaimanapun tidak bersetuju dengan alasan yang diberikan oleh timbalan kanan pendaftar dan memutuskan bahawa perayu telah menunjukkan bukti untuk memuaskan mahkamah bahawa perayu telah menggunakan kesemua cara untuk mendapatkan hutang yang kena dibayar oleh peminjam. PK walau bagaimanapun memutuskan bahawa perayu tidak mematuhi s 5(3) Akta sebelum memulakan prosiding kebankrapan terhadap responden yang mana adalah penjamin sosial kerana perayu tidak memohon izin kepada mahkamah bagi tujuan tersebut. Rayuan perayu terhadap keputusan PK ditolak oleh Mahkamah Rayuan. Maka, rayuan ini. Isu yang berbangkit adalah sama ada frasa 'unless he proves to the satisfaction of the court that he has exhausted all avenues to recover debts owed to him by the debtor' dalam s 5(3) Akta memerlukan pemiutang penghakiman mendapatkan izin mahkamah sebelum memulakan tindakan kebankrapan terhadap penjamin sosial?

Diputuskan, membenarkan rayuan:

(1) Atas pembacaan betul terhadap ss 5 dan 6 Akta, pemiutang perlu memuaskan mahakmah pada pendengaran petisyen pemiutang bahawa pemiutang telah menggunakan kesemua cara untuk mendapatkan hutang yang kena dibayar kepadanya oleh penghutang. Ini boleh dibuat melalui afidavit berikutan kepada s 6(1) Akta. Selanjutnya, mahkamah dikehendaki untuk membuat keputusan kehakiman atas petisyen pemiutang. Sebaliknya, apabila mahkamah mengeluarkan notis kebankrapan, prosedur adalah lebih bersifat pentadbiran (lihat perenggan 32).

(2) Dengan mengeluarkan notis kebankrapan terhadap penjamin, ia tidak membuatnya seorang bankrap. Apabila perintah penerimaan dibuat oleh mahkamah terhadap penghutang pegawai pemegang harta menjadi penerima hartanah penghutang. Perintah penerimaan tidak memberi kesan untuk membuat penghutang menjadi bankrap. Tujuan perintah penerimaan adalah untuk melindungi hartanah penghutang. Penghutang adalah seorang bankrap jika hanya dihakimi oleh perintah penghakiman berikutan s 24 Akta. Perintah penghakiman mungkin dibuat secara serentak dengan pembuatan perintah penerimaan (lihat perenggan 33).

(3) Pembacaan terhadap s 5(3) Akta akan jelas menunjukkan maksud bahawa ia adalah pematuhan mencukupi dengan s 5(3) Akta jika pemiutang menunjukkan melalui afidavit di pendengaran petisyen pemiutang yang ia telah mematuhi kehendak s 5(3) Akta. Perkataan-perkataan 'bankruptcy action' dalam s 5(3) Akta mesti dibaca sebagai 'bankruptcy petition'. Di bawah s 2 Akta terma, 'bankruptcy petition' termasuk petisyen bagi perintah penerimaan (lihat perenggan 34).

(4) Mahkamah Tinggi berpuas hati daripada keterangan afidavit bahawa perayu telah membuktikan yang ia telah menggunakan kesemua cara untuk mendapatkan hutang yang kena dibayar kepadanya oleh peminjam. Dengan itu, perayu telah memuaskan kehendak s 5(3) Akta untuk memulakan notis kebankrapan terhadap responden. Persoalan undang-undang yang dibangkitkan dalam rayuan ini dijawab dalam negatif. Perintah-perintah mahkamah bawahan diketepikan (lihat perenggan 35–36).]

Notes

For cases on setting aside, see 1(3) *Mallal's Digest* (5th Ed, 2015) paras 3500–3551.

Cases referred to

Andrew Lee Siew Ling v United Overseas Bank (M) Bhd [2013] 1 MLJ 449, FC (refd)
Azham Othman; ex p Affin Bank Bhd [2012] 2 CLJ 96, HC (refd)
Chin Choy & Ors v Collector of Stamp Duties [1979] 1 MLJ 69, FC (refd)
Malaysia Shipyard and Engineering Sdn Bhd v Bank Kerjasama Rakyat Malaysia Bhd [1985] 2 MLJ 359, SC (refd)
Mamat bin Talib (Timbalan Ketua Polis, Johor) & Anor v Abdul Jalil bin Rashid [2006] 2 MLJ 108, CA (refd)
Mokhtar bin Amin v Mohamed Moktar bin Omar [2001] 4 MLJ 329, CA (refd)
Sangeeta Singh v Union of India and others (2005) 7 SCC 484, SC (refd)
Sri Bangunan Sdn Bhd v Majlis Perbandaran Pulau Pinang & Anor [2007] 6 MLJ 581, FC (refd)
United Malayan Banking Corp Bhd v Ernest Cheong Yong Yin [2001] 1 MLJ 561, CA (refd)

Legislation referred to

Bankruptcy Act 1967 ss 2, 3(2), 5, 5(3), 6, 6(1), (2), 24
Bankruptcy Rules 1969 rr 91, 92, Forms 4, 5

Appeal from: Civil Appeal No W-03(IM)-204–12 of 2013 (Court of Appeal, Putrajaya)

Tan Gian Chung (Izzan Ahmad Zairee with him) (Shook Lin & Bok) for the appellant.
Yusman bin Che Aman (Hazura Yusoff & Partners) for the respondent.

Hasan Lah FCJ (delivering judgment of the court):

INTRODUCTION

[1] This is an appeal against the decision of the Court of Appeal given on 11 July 2014 which upheld the decision of the Kuala Lumpur High Court affirming the senior assistant registrar's decision to set aside the appellant's bankruptcy notice against the respondent.

[2] The leave to appeal was given by this court on 6 January 2015 on the following question of law:

> Whether the phrase 'unless he proves to the satisfaction of the court that he has exhausted all avenues to recover debts owed to him by the debtor' in section 5(3) of the Bankruptcy Act 1967 requires a judgment creditor to obtain leave of court prior to commencing a bankruptcy action against a social guarantor?

BACKGROUND FACTS

[3] The respondent had guaranteed the repayment of amounts outstanding under a hire purchase agreement ('HP agreement') between the appellant and one Mohd Shahreen bin Abd Khabir ('hirer') in respect of a motor car for personal use.

[4] Upon the hirer's default in repayment of the outstanding sums under the HP agreement, the appellant took steps to repossess the motor car from the hirer and commenced legal proceedings against the hirer and the respondent. The appellant obtained a judgment in default of appearance against the hirer and the respondent on 15 January 2010. The judgment was served on the hirer and the respondent under cover of the appellant's former solicitors' letter dated 30 March 2010.

[5] On 31 March 2011, the appellant obtained receiving and adjudication orders against the hirer.

[6] On 15 August 2011, the appellant filed a request for issue of bankruptcy notice and a bankruptcy notice against the respondent. Vide orders dated 4 November 2011, the validity of the bankruptcy notice against the respondent was extended and the bankruptcy notice was ordered to be served on the respondent by way of substituted service. It was effected on 30 November 2011 and 2 December 2011.

[7] On 29 March 2012 the appellant presented a creditor's petition against the respondent. In response, the respondent issued a letter dated 7 June 2012 to the appellant, proposing to settle his debt totaling RM50,000 by paying monthly installments of RM200 and a deposit of RM2,000. The settlement proposal was rejected by the appellant.

[8] The respondent then issued a letter dated 7 September 2012 to the appellant to inform the latter that the motor car can be repossessed at a particular address in Port Klang.

[9] On 26 September 2012, the respondent applied to set aside the bankruptcy notice on the following grounds:

(a) the respondent had not been personally served either the judgment or bankruptcy notice;

(b) the outstanding sum stated in the bankruptcy notice was wrong;

(c) the respondent had a meritorious defence to the appellant's claim against him under the guarantee; and

(d) the respondent would ensure that the motor car be returned to the appellant.

[10] The appellant's authorised repossession agent issued a letter dated 23 October 2012 confirming that he had made several attempts to repossess the motor car at the address in Port Klang provided by the respondent but to no avail.

DECISION OF THE HIGH COURT

[11] The senior assistant registrar allowed the respondent's application to set aside the bankruptcy notice on the ground, inter alia, that the appellant failed to show any proof to the satisfaction of the court that the appellant had exhausted all avenues to recover the debt owed by the hirer pursuant to s 5(3) of the Bankruptcy Act 1967 ('the Act').

[12] The appellant's appeal to the learned judicial commissioner against that decision was dismissed on 30 October 2013. The learned judicial commissioner however disagreed with the reason given by the senior assistant registrar. Instead, the learned judicial commissioner held that the appellant had shown proof to the satisfaction of the court that the appellant had exhausted all avenues to recover the debt owed by the hirer. The learned judicial commissioner held that the appellant had taken steps to locate the car; but failed to repossess the same. The hirer was also adjudged a bankrupt on the application by the appellant.

[13] However, the learned judicial commissioner held that the appellant had not complied with s 5(3) of the Act before commencing the bankruptcy proceedings against the respondent who was a social guarantor as the appellant did not apply for leave to court for that purpose.

DECISION OF THE COURT OF APPEAL

[14] The appellant's appeal against the decision of the learned judicial commissioner was dismissed by the Court of Appeal on 11 July 2014. From the judgment of the Court of Appeal it was not clearly stated why the appeal was dismissed. However, reading between the lines it can be assumed that the Court of Appeal agreed with the decision of the learned judicial commissioner that leave was required before the appellant commenced a bankruptcy proceedings against the respondent.

PARTIES' SUBMISSIONS

[15] Learned counsel for the appellant submitted that s 5(3) of the Act does not require the petitioning creditor to obtain leave of court to commence a bankruptcy action against a social guarantor. The provision only requires the petitioning creditor to prove to the satisfaction of the court that it has exhausted all avenues to recover debts owed to him by the debtor. The provision does not say that the act of proving to the satisfaction of the court has to take place before the commencement of a bankruptcy action. It was also submitted that there is no procedural mechanism provided in the Act or the Bankruptcy Rules 1969 ('the Rules 1969') as to how the petitioning creditor is to prove it.

[16] It was the contention of learned counsel of the appellant that both the courts below erred in deciding that the appellant should have obtained leave prior to commencing the bankruptcy action against the respondent as it was not provided under the Act or the Rules 1969 that a petitioning creditor must file an ex parte application for leave to commence a bankruptcy action against a social guarantor when applying for the issue of a bankruptcy notice. According to learned counsel the courts must avoid such construction which would result in filling in the gaps of a statute. The following cases were cited as an authority for that proposition:

(a) *Sri Bangunan Sdn Bhd v Majlis Perbandaran Pulau Pinang & Anor* [2007] 6 MLJ 581;

(b) *Malaysia Shipyard and Engineering Sdn Bhd v Bank Kerjasama Rakyat Malaysia Bhd* [1985] 2 MLJ 359; and

(c) *Sangeeta Singh v Union of India and others* (2005) 7 SCC 484.

[17] It was further submitted by learned counsel for the appellant that in the instant case the appellant had proven to the satisfaction of the court that the appellant had exhausted all avenues to recover the debt owed by the hirer. As such, the non-compliance (if any) was merely with regard to the procedure and did not occasion any prejudice to the respondent. In support of that the following cases were cited:

(a) *Mamat bin Talib (Timbalan Ketua Polis, Johor) & Anor v Abdul Jalil bin Rashid* [2006] 2 MLJ 108;

(b) *United Malayan Banking Corp Bhd v Ernest Cheong Yong Yin* [2001] 1 MLJ 561; and

(c) *Mokhtar bin Amin v Mohamed Moktar bin Omar* [2001] 4 MLJ 329.

[18] In response, learned counsel for the respondent merely submitted that under s 5(3) of the Act leave was required to commence a bankruptcy petition against the respondent. No case law was referred to by learned counsel for the respondent in his brief submission and he did not even file a written submission for the respondent.

OUR DECISION

[19] Section 5(3) of the Act provides:

> (3) A petitioning creditor shall not be entitled to commence any bankruptcy action against a social guarantor unless he proves to the satisfaction of the court that he has exhausted all avenues to recover debts owed to him by the debtor.

[20] Under s 2 of the Act 'social guarantor' has been defined as a person, inter alia, who provides, not for the purpose of making profit, a guarantee for a hire purchase transaction of a vehicle for personal or non-business use.

[21] The procedure for issue of a bankruptcy notice is provided under r 92 of the Rules 1969 as follows:

> When applying for the issue of a bankruptcy notice, the creditor shall —
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> (a) produce to the Registrar an office copy of the judgment or order on which the notice is founded;
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> (b) file the notice, together with a request for issue;
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> (c) lodge sufficient number of copies of the bankruptcy notice to be sealed and issued for service.

[22] In *Azham Othman; ex p Affin Bank Bhd* [2012] 2 CLJ 96, one of the issues before the court was whether leave of court was mandatory to commence

bankruptcy action against a social guarantor. At pp 112–113 of the report, the High Court said: A

> (III) In my view that failure to provide a specific procedural mechanism does not mean the judgment creditor cannot seek the leave of court and satisfy the criteria in s 5(3) of the Bankruptcy Act 1967 before issuing the bankruptcy notice. In my view there are various procedural methodologies the judgment creditor could employ to satisfy the criteria set out in s 5(3). One is O 5 r 3 of the Rules of the High Court 1980 which states: B
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> > Proceedings by which an application is to be made to the High Court or a judge thereof under any written law must be begun by originating summons except where by these rules or by or under any written law the application in question is expressly required or authorised to be made by some other means. This rule does not apply to an application made in pending proceedings. C
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> I am mindful of the fact that the Rules of the High Court 1980 generally may not apply to bankruptcy proceedings unless there is lacuna. However, on this issue it must be noted the seeking of leave is not a commencement of bankruptcy proceedings under the Bankruptcy Act 1967 or its rules. I am also mindful of the fact of the decision of Justice Gopal Sri Ram JCA (as he then was) in *Malaysia Building Society Bhd* where it was held that the Bankruptcy Act 1967 is a complete code within the framework of which must be found all the powers exercisable by the high court by the bankruptcy jurisdiction. If O 5 r 3 of the Rules of the High Court 1980 is not employed then taking the lead from the above case one may file an application at the time the request for bankruptcy notice is filed and obtain the leave of court before the bankruptcy notice is issued. The application can be ex parte and must specifically seek an order for the bankruptcy notice to be issued only upon leave being granted. It will be prudent to serve the application to the judgment debtor at leave stage at the last known address to give ample opportunity for the judgment debtor to contest the same. D E F

[23] It is pertinent to note that in the instant case the learned judicial commissioner, after having considered the affidavits filed by the appellant, held that the appellant had taken all the necessary steps, and had exhausted all avenues against the hirer. Therefore, as pointed by the learned judicial commissioner in her judgment, the only issue in the instant case was whether the appellant should have filed an ex parte application for leave to commence bankruptcy proceedings against the respondent, a social guarantor, before the appellant filed the bankruptcy notice or would the filing of an affidavit to explain all the steps taken against the hirer is enough to satisfy the requirement of s 5(3) of the Act. G H

[24] The learned judicial commissioner then agreed with the decision in *Azham Othman; ex p Affin Bank Bhd* that the appellant must apply for leave before commencing the bankruptcy proceedings against the social guarantor. I

[25] The issuance of a bankruptcy notice in Form 5 is pursuant to s 3(2) of

the Act and r 91 of the Rules 1969. It is pertinent to note that in Forms 4 and 5 of the Rules 1969 a creditor is not required to state that he has complied with the requirement of s 5(3) of the Act. At the same time there is nothing in the Act or the Rules 1969 to say that leave must first be obtained before a bankruptcy notice is issued by the court.

[26] There are certain formalities to be observed when filing the bankruptcy notice. It must be accompanied by a request to the registrar to issue a bankruptcy notice. The bankruptcy notice is dated by the registrar and sealed. There must be an endorsement upon the notice stating that if the debtor has any set-off, counterclaim or cross-demand, he must file an affidavit to that effect.

[27] After those formalities are complied with by the creditor the court is required to issue the bankruptcy notice.

[28] With respect, we are unable to agree with the decision of the courts below. If the Legislature has so intended one would expect it to have spelt out that requirement in an express and clear provision to that effect. Such as important requirement cannot, in our view, be inferred from the words used in s 5(3) of the Act. We are not at liberty to brush aside the explicit provisions of s 5(3) of the Act and r 92 of the Rules 1969. There is nothing to say that leave must first be obtained by the creditor before a bankruptcy notice is applied.

[29] In interpreting the provisions of a statute, one of the cardinal rules is to adhere as closely as possible to the literal meaning of the words. The duty of the court is limited to interpreting the words used by the Legislature and to give effect to the words used by it. Where the language used is clear and unambiguous, it is not the function of the court to re-write the statute in a way which it considers reasonable. In *Chin Choy & Ors v Collector of Stamp Duties* [1979] 1 MLJ 69 at p 70, the Federal Court said:

> It may be apposite at this stage to recall certain basic principles in the interpretation of statutes. Applying the words and phrases of a statute in their ordinary meaning has been said to be the first and most elementary rule of construction and the second is said to be to construe the phrases and sentences according to the rules of grammar.
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> It is very desirable in all cases to adhere to the words of an Act of Parliament, giving to them that sense which is their natural import in the order in which they are placed, per Bayley J in *R v Ramsgate (Inhabitants)*.

[30] In *Andrew Lee Siew Ling v United Overseas Bank (M) Bhd* [2013] 1 MLJ 449 the Federal Court had this to say at pp 457–458:

> Section 17A of the Interpretation Act provides that:

A construction that would promote the purpose or object underlying the Act (whether that purpose or object is expressly stated in the Act or not) shall be preferred to a construction that would not promote the purpose or object.

On the proper application of the provision of the said s 17A of the Interpretation Act we would refer to the case of *All Malayan Estates Staff Union v Rajasegaran & Ors* [2006] 6 MLJ 97 wherein the court had laid down the principles, inter alia, as follows:

In summarising the principles governing the application of the purposive approach to interpretation, *Craies on Legislation* (8th Ed) says at p 566;

(1) Legislation is always to be understood first in accordance with its plain meaning;

(2) Where the plain meaning is in doubt the court will start the process of construction by attempting to discover from the provisions enacted, the broad purpose of the legislation;

(3) Where a particular reading advance the purpose identified, and would do no violence to the plain meaning of the provisions enacted, the courts will be prepared to adopt that reading.

(4) Where a particular reading would advance the purpose identified but would strain the plain meaning of the provisions enacted, the results will depend on the context and, in particular, on a balance of the clarity of the purpose identified and the degree of strain on the language.

[31] It is pertinent to note that s 5 of the Act deals with creditor's petition and under the heading of 'Receiving Order'. Section 6(1) of the Act provides that a creditor's petition shall be verified by affidavit of the creditor or of some person on his behalf having knowledge of the facts. Section 6(2) of the Act provides that at the hearing of the creditor's petition the court may make a receiving order in pursuance of the petition.

[32] On a proper reading of ss 5 and 6 of the Act we are of the view that a creditor has to satisfy the court at the hearing of the creditor's petition that the creditor has exhausted all avenues to recover debts owed to him by the debtor. This can be done by way of an affidavit pursuant to s 6(1) of the Act. Furthermore at this stage the court is required to make a judicial decision on the creditor's petition. On the other hand, when the court issued a bankruptcy notice pursuant to r 91 of the Rules 1969 the procedure is more administrative in nature.

[33] The purpose of having s 5(3) of the Act which was inserted by Bankruptcy (Amendment) Act 2003 (Act A1197) is to protect the social guarantor. There are cases where the creditors have been taking the easiest and shortest way out by claiming the defaulted loans from the guarantors directly without making serious effort to get the payments from the principal

borrowers. This provision will therefore protect these guarantors from being adjudged bankrupt easily. By issuing a bankruptcy notice against a guarantor it does not make him a bankrupt. When a receiving order is made by the court against a debtor the official assignee becomes the receiver of the property of the debtor. The receiving order does not have the effect of making the debtor bankrupt. The aim of the receiving order is to protect the debtor's property. The debtor is a bankrupt only if adjudged so by the adjudication order pursuant to s 24 of the Act. An adjudication order may be made simultaneously with the making of the receiving order.

[34] In our judgment, a reading of s 5(3) of the Act in the context of the purpose identified above would clearly advance the meaning that it would be sufficient compliance with s 5(3) of the Act if a creditor shows by way affidavit at the hearing of the creditor's petition that he has satisfied the requirement of s 5(3) of the Act. The words 'bankruptcy action' in s 5(3) of the Act has to be read as 'bankruptcy petition'. Under s 2 of the Act the term 'bankruptcy petition' includes a petition for receiving order.

[35] In the instant case the High Court, as mentioned earlier, was satisfied from the affidavit evidence that the appellant had proved that it had exhausted all avenues to recover debts owed to him by the hirer. As such the appellant had satisfied the requirement of s 5(3) of the Act to commence the bankruptcy action against the respondent.

[36] For the reasons given above, we answer the question of law posed in this appeal in the negative. Accordingly, we allow the appeal by the appellant with costs. The orders of the courts below are set aside.

Appeal allowed.

Reported by Afiq Mohamad